

Nguyen (Migration) [2018] AATA 3240 (10 July 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Ms Thi Lan Phuong Nguyen Mr Dang Vinh Pham Mr Minh Dang Pham
CASE NUMBER:	1705465
DIBP REFERENCE(S):	BCC2015/952990
MEMBER:	Russell Matheson
DATE:	10 July 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations; and • cl.820.221(1)(a) of Schedule 2 to the Regulations. • The secondary applicants meet: • cl.820.311(a)(i) of Schedule 2 to the Regulations.

Statement made on 10 July 2018 at 12:38pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Whether the parties are in a genuine spousal relationship – Moderately joint finances – Joint household responsibilities – Moderate evidence of the social aspects of the relationship – Relationship viewed as continuous and ongoing – Decision remitted with direction

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 376

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 820.211, 820.311

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 10 March 2017 to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named applicant (the applicant) applied for the visa on 26 March 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant is the spouse of the sponsor. The applicant seeks review of the delegate's decision.
4. The applicants appeared before the Tribunal on 3 July 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and Henry Vo Tran (the sponsor's son). The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicants were represented in relation to the review by their registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for consideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
8. The Tribunal has before it the Department's file relating to the applicant; its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.
9. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record.
10. **Hearing**
11. On 25 June 2018 the Tribunal informed the applicant that certain information in the Department file was subject to an s.376 certificate that was at the discretion of the Tribunal to reveal. The Tribunal told the applicant that information contained in folios 143-152 of the Department's file number BCC2015/952990 related to an allegation that the applicant had paid the sponsor to enter into a contrived marriage with her so she could remain in Australia and the sponsor was still living with his former wife. The Tribunal told the applicant it considered the s.376 certificate valid and asked the applicant did she wish to make comments as to the validity of the certificate. The applicant made no comment as to the validity of the certificate.
12. The applicant told the Tribunal that she was previously made aware of the adverse information by the Department, further stating that there is no substance to the allegation

and it is not true. The sponsor also told the Tribunal that the allegation is not true and that he has an amicable relationship with his former wife and often visits his son who lives with her. The Tribunal places no weight upon the information subject to the s.376 certificate as it was given by an unnamed source.

Whether the parties are in a spousal or de facto relationship

13. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
14. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the parties' household and their commitment to each other as set out in r.1.15A(3) of the Regulations, which is extracted in the attachment to this decision.

Are the parties validly married?

15. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate indicating that the parties' marriage was registered in the state of New South Wales on 8 March 2015. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
16. In forming an opinion as to whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the applicant's and sponsors household and their commitment to each other as set out in r.1.15A(3).
17. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
18. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence at the hearing and found their evidence to be detailed, consistent, and overall credible. The Tribunal gave all the evidence provided by the parties and two witnesses at the Tribunal hearing and evidence provided by the applicant to the Department and Tribunal file due regard. The applicant provided a significant amount of additional documentary and photographic evidence to the Tribunal.

19. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing and the Tribunal is satisfied that the parties were credible witnesses.

Are the other requirements for a spousal relationship met?

20. *Financial aspects*

21. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses.
22. The parties provided documentary evidence of operating a joint account with the ANZ bank for the period 21 August 2017 to 20 October 2017. The parties stated that the joint account is utilised for their day to day living expenses and health deductions such as Medicare and Bupa health payments. The sponsor told the Tribunal that he has his own personal St George account and this account is used for the deposit of his wages and loan repayments. The parties provided correspondence from St George bank, dated 9 June 2017, indicating that the applicant has authority to operate the sponsors complete freedom offset account. The sponsor informed the Tribunal that the sponsor manages all their financial affairs. The parties provided evidence of financial support for the education of the applicant's sons' (the secondary applicants) education. The sponsor told the Tribunal that he has a bank loan and property portfolio with his adopted sister Miss Thi T Dang. The applicant in evidence had a sound knowledge of the sponsor's investments and adopted sister.
23. The parties had a sound knowledge and presented detailed and consistent evidence of their financial affairs, including income, personal accounts, their joint account, the daily living expenses, bank loans, property portfolio and payment of health and utility bills.
24. There is limited evidence before the Tribunal that the parties pool their financial resources. The parties do not have any joint ownership of real estate, any major assets or joint liabilities. There is no evidence of any one person in the relationship owing any legal obligation in respect of the other. Overall, on balance the Tribunal places moderate weight on this aspect of the relationship.

25. *Nature of the household*

26. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of children, if any, the living arrangements and daily routine of the parties and the sharing of the responsibility for housework, to form an opinion as to whether the parties are living together permanently in a partner relationship.
27. The couple provided evidence that they are living together at Cabramatta in the sponsor's investment property. The couple gave detailed and consistent evidence about their living arrangements at their current residential address at Cabramatta living with the applicant's two sons. They provided detailed and consistent evidence of their personal history, living arrangements and household responsibilities, purchasing household items and their daily routine and activities. The parties stated that they had notified government agencies that they were in a spousal relationship.
28. The parties provided additional documentary evidence in individual and joint names such as health care membership, private health insurance details, bank statement's, utility bills and individual tax returns related to their current address at Cabramatta.

29. The Tribunal accepts that the parties live together and that they have established a joint household. The Tribunal accepts that they share the responsibility for the household duties.

30. **Social aspects**

31. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinions of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
32. The Tribunal accepts that the relationship is socially recognised by family and friends. There are limited statements from third parties, including close family members, who express their view that the relationship is a genuine one. The Tribunal places little weight on the statements as they do not give any convincing reasons as to why they believe the relationship to be genuine or give any insight into the development of the relationship.
33. The parties stated that they socialise with friends and family at home and dining out locally at Cabramatta. The parties stated that they regularly attend the local bowling club on Sundays and recently attended a family friend's wedding at Cabramatta. The sponsor also stated that he likes to go fishing with friends on weekends.
34. The Tribunal accepts that the relationship is socially recognised by family and friends. There are limited statements from third parties, including close family members, who express their view that the relationship is a genuine one. The Tribunal places some weight on the social aspects of the relationship.

35. **Commitment**

36. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
37. The parties claim to have first met in February 2014 when introduced to each other by friends when the applicant visited Australia. The applicant returned to Vietnam in April 2014 and the parties stated that they remained in contact via telephone, Skype and Viber until the applicant returned to Australia in December 2014. The parties claim that their relationship developed and grew stronger when physically together in Australia and decided to marry in a civil ceremony at Cabramatta on 8 March 2015. To date, the applicant and sponsor have been in a committed relationship exceeding three years. The Tribunal accepts that the parties are lawfully married.
38. The parties and the witness provided detailed and consistent evidence of the parties' life together and as a family. The parties provided persuasive oral and documentary evidence of financial plans and future together as a family unit. The sponsor provided documentary evidence of the applicant being part beneficiary of his superannuation. The parties provided evidence of their mutual care and support of their children from previous marriages. The parties also provided evidence of love, care and support of each other.
39. Based on the evidence provided, the Tribunal accepts that the applicant and sponsor were in a genuine and continuing relationship and did not live separately and apart on a permanent basis at the time of application.
40. The Tribunal is satisfied the applicant and the sponsor provide each other a degree of companionship and emotional support that is commensurate with a couple being in a

genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long-term one.

41. Findings

42. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided at the hearing, that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing and that they do not live separately and apart on a permanent basis.
43. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
44. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided at the hearing, that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together and not separately and apart on a permanent basis. Having considered all the evidence and circumstances of the relationship, as detailed above, the Tribunal is satisfied the parties were in a spousal relationship at the time of application.
45. The Tribunal is satisfied that the sponsor is not prohibited from being a sponsoring partner and continues to sponsor the applicant. The Tribunal is satisfied that the sponsor, at the time of the visa application and decision, was an Australian citizen who had turned 18.
46. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
47. Therefore the applicant meets cl.820.211(2) and cl.820.221(1)(a).
48. The Tribunal is satisfied that the secondary visa applicants are members of the family unit of, and made a combined application with, the primary applicant who satisfies the primary criteria in Subdivision 820.321. Therefore, the secondary applicants meet the requirements of cl 820.311(a)(i) of Schedule 2 of the Regulations.
49. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

50. DECISION

51. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2) of Schedule 2 to the Regulations; and
 - cl.820.221(1)(a) of Schedule 2 to the Regulations; and
52. The secondary applicants meet:
 - cl.820.311(a)(i) of Schedule 2 to the Regulations.

Russell Matheson
Member

53.

54.

55.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

(1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).